CHANAN KAUR & ORS. v. CHUA HUP LEE & AMBROSE WONG & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Salleh Abas & Abdul Hamid F.JJ.) October 14 & December 16, 1982]

[Kota Kinabalu – Federal Court Civil Appeal No. 65 of 1982]

Landlord and Tenant – Standard Rent – Application to increase standard rents – Principles applicable – Tenancy Tribunal relying on advice from State Valuer – State Valuer not a witness or a member of Tribunal – Breach of natural justice – Rent Control (Business Premises) Enactment, 1966, of Sabah, ss. 41, 11, 13, 15, 17 and 18.

In this case an application was made to the Labuan Tenancy Tribunal for the increase of the standard rents of certain business premises. The Tribunal heard advice from the State Valuer of the Lands and Survey Department, Kota Kinabalu and accepted his advice. The State Valuer was not called as a witness, nor was he a member of the Tribunal. The appellant applied to set aside the order of the Tribunal. This was refused in the High Court and the appellant appealed to the Federal Court.

Held, whilst the matter of fixing and determining the standard rent is highly technical and assistance must be sought from persons trained in the profession and acquainted with the supply and demand of rented premises, the Labuan Tenancy Tribunal is not empowered to consult them in the absence of the parties. In this case the State Valuer gave no evidence and the court has no means of knowing what advice he had tendered to the Tribunal nor did the court know his computation of the standard rent which was said to be based on the market value of the premises. As the parties were not in a position to challenge his computation and advice, the acceptance of the advice was a serious breach of natural justice and therefore the order of the Tribunal must be set aside.

FEDERAL COURT.

James Puthucheary (*Abdul Razak Rouse*) with him for the appellants.

Leong Funk Chiew for the respondents.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the Judgment of the Court): This appeal arose from the decision of Wan Mohamed J. in refusing the appellants' application by Original Motion, O.M. No. 1/1981, under section 20 of the Rent Control (Business Premises) Enactment, 1966 of Sabah to set aside an order made on December 23, 1980 by the Labuan Tenancy Tribunal increasing the standard rents of the premises of which the appellants are tenants.

The Labuan Tenancy Tribunal (LTT) is a body established under section 11 of the Enactment, charged with the duties of fixing and determining what is known as the standard rent for business premises, which is defined as that "ascertained or fixed" in accordance with the provisions of the Enactment. The Enactment lays down an elaborate procedure for this purpose. Upon an application of either the landlord or the tenant of any premises for the purpose of fixing the standard rent or for increasing or reducing such rent the LTT has to hear and determine such application and make an order accordingly. In fixing or varying the standard rent section 15(1) enacts that the LTT has to have "regard to the provision of section 17". This section contains provisions as to the principles on which the LTT should act in fixing or varying the standard rent. We shall advert to these principles at the later stage of this judgment.

Under certain circumstances the LTT is empowered by the Enactment to review, vary or set aside its own order (section 18). Under section 19 the LTT may review by way of case stated for consideration of the High Court any question of law arising at any stage of its proceedings, and under section 20 the proceedings and the grounds of its order can be called into question in the High Court either at the instance of the court itself or on the application by an aggrieved party. Such application must be made within 14 days of the LTT's decision.

In the present appeal the LTT gave its decision on December 23, 1980 and the application under section 20 was not made until February 12, 1981. There was thus a lapse of twenty days. As nobody raised this issue, this short delay of six days in our view being a mere irregularity should not affect the subsequent proceedings before the court below and before us.

Pursuant to applications by the respondent (landlords) for increase of the standard rents under section 4(2), the LTT sat on two occasions, i.e. on September 29 and 30, 1980 to hear the applications and duly recorded the evidence given by both sides. After an adjournment, on December 23, 1980 the LTT delivered its decision and present on this occasion were the chairman and one member only; the others being absent. The quorum of the LTT is governed by section 13(1) which is as follows:

"(1) Three members of a Tribunal, of whom the chairman shall be one, shall form a quorum for the transaction of the business of the Tribunal."

Counsel for the appellants therefore submitted that the LTT, lacking in quorum, could not deliver

its decision and that the decision given and the subsequent orders made pursuant to such decision were null and void, contending that the phrase "the transaction of the business" in section 13(1) includes the delivery of its decision and that unless the Enactment makes a provision for a lesser number of members to be present for the purpose of delivering its decision, the decision and the subsequent orders made were null and void. He drew an analogy from the practice of the Federal Court in which, more often than not, only one member of the court gives judgment, although the hearing of appeals may be heard by five or three judges. The practice is based on Rule 67(2) of the Federal Court Rules which is as follows:

"Such judgment may be pronounced notwithstanding the absence of the judges who composed the court or any of them, and the judgment of any judge not present may be read by a judge of the Federal Court or of a High Court or by the Registrar."

With respect to counsel, we find ourselves in disagreement with his submission. Although the phrase "the transaction of the business" may well include the delivery of judgment or decision, this phrase in the context of section 13 of the Enactment cannot be given such a wide meaning because the proviso of the section clearly speaks of the quorum "for the purpose of the *consideration* of such matter". The sitting of the LTT on December 23, 1980 was not for the purpose of considering the application to vary the standard rents; these having been considered earlier, but for the purpose of conveying or communicating its decision to the parties. Lack of quorum in our view is immaterial, because the LTT had nothing to consider.

Reverting to the analogy of the Federal Court's practice, we observe that the practice of a single judge giving judgment of the court is founded only on the Rule and this was not at all mentioned in the Judicature Act. Giving judgment is the last function of the court after its deliberation and consideration of the matter before it is over. Clearly it is not a matter which affects the substance or jurisdiction and could really be regarded as merely an incidental or a ministerial act and as such it was relegated to the rules only. That being the case, we see no merit in the appellants' ground of appeal on this point.

The only ground of appeal which merits our consideration is the appellants' submission that in fixing the standard rent in this case the LTT acted contrary to section 17(1) and (2) of the Enactment.

The applications to vary the standard rents were all made under section 4(2) and heard by the LTT under section 15(1)(b). Section 4(2) says:

"4. (2) The landlord or the tenant of any business premises may at any time apply to the Tribunal to vary the standard rent of such premises."

Section 15(1)(b) says:

"15.(1) A Tribunal in respect of any business premises situated within its area of jurisdiction:

(b) shall hear and determine any application made under subsection (2) of section 4 of this Enactment and may make such order varying the standard rent of the premises concerned as to the Tribunal may seem just and proper having regard to the provisions of section 17 of this Enactment, or may refuse to make such an order:

Provided that the Tribunal shall refuse to make such an order having the effect of varying a prior rent order unless such rent order may properly be varied under the provisions of section 18 of this Enactment;"

Thus the substantive principles upon which the LTT must act in order to fix the standard rent as we have said earlier are contained in section 17.

Subsection (2) of section 17 makes a provision that in respect of an application under section 4(2), the LTT may vary the standard rent whenever:

"the standard rent of the premises concerned is in the opinion of the LTT substantially higher or lower than it would be if ascertained on the principles of subsection (1) of this section."

Thus LTT has to make two findings, viz:

(1) what is the existing standard rent, i.e. the rent at which the premises are currently let; and

(2) what would be the standard rent if the principles in subsection (1) of section 17 is applied, i.e. the notional or the would-be standard rent.

Only in cases where the differences between the existing and the would-be standard rents either up or down are substantial, would the LTT vary the existing standard rent. If the differences are merely minor, no variation would be made. Whilst there is ample evidence of the current rents at which the premises are let, there is no clear evidence which could assist the LTT to determine the would-be standard rent. This would-be standard rent is not the rent which the landlords asked for, but one which has to be determined with reference to the principles contained in subsection (1) of section 17.

What then is the principle? According to this subsection – subsection (1) of section 17 – the standard rent is such rent "as, in the opinion of the Tribunal, might reasonably have been expected in respect of a similar letting of similar business premises in the same locality." This means that there must be two criteria in order to constitute the standard rent at any given time – namely, reasonableness and comparableness. We therefore reject the contention of the respondents that the principle under section 17(1) is not applicable to the application of variation of the standard rent under section 4(2). This submission is completely misconceived as it renders the concept of variable standard rent completely nugatory. Perhaps it is more accurate to say that the standard rent as an expression is conceived by the Enactment as immutable but its amount at any given time is not necessarily static but variable. To say that subsection (1) of section 17 does not apply to the deliberation of the LTT on an application for variation of the standard rent is to go against this basic purpose of the Enactment.

According to the notes of the evidence given before the LTT, the respondents asked for the rental with reference to the areas of the premises at the rate of $1.00 per square foot. Whilst it is not wrong for the LTT to proceed in fixing the standard rent according to rate per square foot and whilst we appreciate that it is the LTT's function, and not that of the court, still less ours, to fix the standard rent, the decision of the LTT and its orders could be set aside by the court if the LTT is found to have acted against the principle upon which it is required to act.

According to its decision, the LTT appeared to have consulted the State Valuer of the lands and Survey Department, Kota Kinabalu. The relevant paragraphs of the LTT's decision are as follows:

"Upon hearing all the applications made by the landlords of shophouses and upon hearing submissions *presented* by both lawyers for the landlords and tenants, this Committee, *after hearing advice from the State Valuer of the Land & Survey Department, Kota Kinabalu* has decided that Standard Rent applicable upon these shops stated below

. . . . . .

This Committee found that locations of shophouses in Labuan are immaterial because we felt that wherever the locality of a shop amounts to same visiting customers. *From the calculation of the assisting valuer of shophouses based on the existing market value the standard rent that this Committee has fixed is fair and reasonable.*

This standard rent is effective from November 1, 1979."

(the emphasis is ours)

The learned trial judge considered that the back-dating of the new standard rent to November 1, 1979 was unreasonable and so altered its effective date to January 1, 1981. The interference by the learned trial judge drew a cross-appeal by the respondents. There is of course nothing in the Enactment which prohibits the LTT from back-dating its decision, so long as it is reasonable to do so. We have no idea why the date of the commencement should be either on November 1, 1979 or January 1, 1981. We should have thought that the date on which the decision was made should be the starting point but if the back-dating is necessary it should not go beyond the date on which applications for variation were made.

On this score the LTT's decision cannot be held to be reasonable, there being no basis for such date of commencement.

But the serious objection to its decision is consultation and acceptance of the advice of the State Valuer, who was not a witness, nor its member.

Whilst the matter of fixing and determining the standard rent is highly technical, and assistance must be sought from persons trained in the profession, and acquainted with the supply and demand of rented premises, the LTT is not empowered to consult them in the absence of the parties. In this case the State Valuer gave no evidence and we have no means of knowing what advice he had tendered to the LTT, nor do we know his computation of the standard rent which is said to be based on the market value of the premises. As the parties were not in a position to challenge his computation and advice, we consider that acceptance of his advice is a serious breach of natural justice, entitling the appellants to this appeal.

Counsel for the appellants argued strongly that it was contrary to the principle enacted by section 4(1) to base the standard rent on the market value of the premises.

We prefer to leave this point open as we do not wish to go so far as to say that comparison of market value of the premises is not permissible for fixing the standard rent. If for example, a shop, whose market value is at $X, is let out at $Y, surely it is reasonable to expect another shop, whose market value is comparable to the first mentioned shop, should be rented at about the same rental. In the present case, we do not know in what way the State Valuer calculated the

standard rent with reference to the market value of the premises. Unless there is evidence we cannot say.

For the reasons given we allow the appeal with costs and dismiss the cross-appeal also with costs, and the deposit should be refunded to the appellants.

Since the standard rent is a continuing process, the respondents are not in any way prejudiced by this judgment, if they so wish, to start fresh proceedings before the LTT.

Appeal allowed;
Cross-appeal dismissed.

Solicitors: *Rayner & Co.; Shelley Yap Leong Tseu Chong Chia & Co.*

TAN CHONG & SONS MOTOR COMPANY (SDN.) BERHAD. v. ALAN McKNIGHT

[F.C. (Wan Suleiman, Salleh Abas and Abdul Hamid F.JJ.) August 17; December 4, 1982]

[Ipoh – Federal Court Civil Appeal No. 15 of 1982]

Contract – Sale of goods – Collateral warranty – Purchase of motor car – Buyer's order containing condition that no guarantee or warranty given by the seller – Oral representation that motor car would conform to Australian Design Regulations – Motor Car supplied not complying with Regulations – Claim for damages for breach of warranty – General and special damages – Special damages not pleaded – Application to amend pleading – Costs.

Evidence – Written contract for purchase of car – Oral representations – Whether admissible – Evidence Act (Revised 1971), s. 92.

Practice & Procedure – Special damages not pleaded – Application to amend pleading – Amendment allowed – Costs – Interest.

English Law – Whether English Sale of Goods Act, 1979, applies in Penang.

In this case the respondent was a squadron leader in the Royal Australian Air Force. He wanted to buy a car and get the benefit of exemption from duty in Malaysia and Australia. He would have obtained the exemption if the motor car was taken out of Malaysia and if it complied with the Australian Design Regulations. He agreed to buy a car from the appellants and signed a Buyer's Order which contained a condition that no guarantee or warranty of any kind whatsoever was given by the company. However the respondent only bought the car on the representations of the appellant's salesman that the car conformed to the Australian Design Regulations. The car supplied did not comply with the Regulations and the respondent had to sell the car for $6,500.00 thereby incurring a loss of $11,219.54 ($17,719.54-$6,500.00). The respondent also lost the fiscal advantage of importing the car to Australia duty free. The respondent claimed damages for breach of warranty. The learned trial judge found that there had been a warranty and this was breached by the appellants. He awarded general damages of $10,500.00 with interest at 8% from the date of the writ to the date of payment and costs of the suit at the Subordinate Court's scale. No special damages were awarded as these were not pleaded and an application for amendment of the pleadings was refused. The appellants appealed to the Federal Court contending that they were not liable or that the damages were too high while the respondents cross-appealed on the ground that the damages were too low and that he was entitled to interest from the date of accrual of the cost of action and to costs of the suit at the High Court scale and to special damages. At the hearing of the appeal, counsel for the appellants accepted the findings of facts by the learned trial judge. The appeal was therefore confined to legal issues on liability and quantum only.

Held: (1) there can be no doubt that it was the representations by the salesman expressed by words and conduct that led to the respondent to enter into the agreement to purchase the car. There was abundance of evidence showing that the representations were not innocent and on the contrary could even be considered to be deceitful or plain lies;

(2) there was clear evidence that had it not been for the promise of the salesman to deliver him a car complying with the Australian Design Regulations, the respondent would not have signed the Buyer's Order;

(3) the representations made by the salesman was binding on the appellants. It would lead to great mischief in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with;

(4) the prohibition against admissibility of evidence under section 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing oral evidence can be given to prove the terms agreed to orally;

(5) where the oral representations as in this case are in conflict with the printed condition in the written contract, the representations must be given an overriding effect and the printed condition must therefore be rejected;

(6) it made no difference in this case whether the English Sale of Goods Act 1893 or the English Sale of Goods Act, 1979, applies in Penang. It was not necessary or relevant to decide the question as to which of the two English Sale of Goods Act is applicable;

(7) the amount of damages which should be awarded in this case should be the financial loss directly suffered by the respondent as a result of the dealing with the appellants i.e. $11,219.54;

(8) it was just and proper in this case that the learned trial judge should allow the amendment of the pleading to enable special damages to be awarded. On the basis of the evidence, special damages of $2,341.35 should be awarded;